Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

LETANTIA BUSSELL, TRUSTEE OF THE BUSSELL FAMILY TRUST DATED 8/18/1982; LETANTIA BUSSELL, AN INDIVIDUAL; AND TODD BUSSELL,

Petitioners

v.

JACQUELINE B. REEDY, TRUSTEE OF THE HELEN CHAMNESS BUSSELL FAMILY TRUST-INITIAL TRUST, dated 7/30/1982; JACQUELINE B. REEDY, CO-TRUSTEE OF THE ELMER JACOB BUSSELL FAMILY TRUST U/W/D 9/18/1980,

Respondents

On Petition For Writ of Certiorari
To The Court of Appeal, Fourth Appellate District
State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under the Due Process guarantee of the Fourteenth Amendment to the United States Constitution, a dismissal or default sanction against a civil litigant for Abuse of Procedural Rights can be upheld for purposes of retribution when there is no finding that the misconduct deprived a party of the evidence necessary to prove a material fact that is determinative of the pled cause of action.

LIST OF ALL PARTIES TO THE PROCEEDING

LETANTIA BUSSELL, TRUSTEE OF THE BUSSELL FAMILY TRUST DATED 8/18/1982

LETANTIA BUSSELL, AN INDIVIDUAL

TODD BUSSELL

JACQUELINE B. REEDY, TRUSTEE OF THE HELEN CHAMNESS BUSSELL FAMILY TRUST-INITIAL TRUST, dated 7/30/1982

JACQUELINE B. REEDY, CO-TRUSTEE OF THE ELMER JACOB BUSSELL FAMILY TRUST U/W/D 9/18/1980

There are no corporations involved in this case.

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeal of California, Fourth Appellate District, was entered on February 23, 2007.

The Court of Appeal denied a timely petition for rehearing on March 26, 2007.

On June 13, 2007 the Supreme Court of California denied a petition for hearing.

The jurisdiction of this Court is invoked under 28 USC §1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amendment Fourteen, Section 1, United States Constitution)

STATEMENT OF THE CASE

The issue herein was presented on appeal to the California Appellate Court. Appellant's Reply Brief, pages 41 through 44, cite two court cases and sets forth the position of Petitioner/Appellant:

> "The court held that pleadings may be stricken only when the stricken pleadings bore some reasonable relationship to the information which was withheld." (*Deyo v. Kilbourne*, 84 Cal.App.3d 771, 792, 149 Cal. Rprtr. 499 (2d Dist. 1978).) (see Appellant's Reply Brief to the Court of Appeal State of California, page 42)
>
> "While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the burden of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law." [citing Hovey v. Elliott, 167 U.S. 409, 414 (U.S. 1897).] (Caryl Richards v. Sup Court, 188 Cal. App. 2d 300, 305, 10 Cal.Rptr. 377 (2nd App. Dist. 1961).) (emphasis added) (see Appellant's Reply Brief to the Court of Appeal State of California, pages 42–43)
>
> "...inappropriate application of terminating sanction ... The trial court's dismissal of the entire case was deemed "punishment" and reversed because the discovery sought to be compelled had only to do with one cause of action [citation] ... In the present case one could not expect answers to be given at a second day of deposition and in the later ordered further answers to written discovery that were more favorable to Respondent than those given

under oath to substantially the same previous discovery requests and questions..." (Appellant's Reply Brief to the Court of Appeal State of California, pages 43–44)

The due process issue as it relates to discovery issues was also raised in multiple references to the authority of United States Supreme Court cases: *Hovey v. Elliott*, 167 U.S. 409, 414 (U.S. 1897) and *Hammond Packing v. Arkansas*, 212 U.S. 322 (U.S. 1909) This issue was also raised in oral argument before the appeals court.[1] The California Appellate Court erroneously stated in its denial of petition for rehearing that Petitioner/Appellant had not timely raised the issue.

"...[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief ... by citing in conjunction with the claim the federal cource of law on which he relies or a case deciding such a claim on federal grounds..." (*Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347 (U.S. 2004).) Petitioners have clearly raised the due process issue to the state court which had fair opportunity to address the claim. The issue was raised in discussion which is repeatedly laced with and depends upon federal law specific to the issue of terminating sanctions and their relationship to due process rights.

The following statement is a direct quote of the pertinent portions of the case history as set forth by the California Appellate Court in its published opinion. The only exceptions being insertions made for the purpose of clarification of parties. (see Appendix, page 3)

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[1] The California Appeals Court has an audio recording of the oral argument. Obviously, the record will contain Appellant's Reply Brief. These items are available to the Court, if desired.

Petitioners were Defendants in the trial court, the widow and the son of a former trustee. They appealed a judgment and orders from the [California trial court], which entered default judgments against them on consolidated probate petitions after imposing terminating sanctions at the request of plaintiff successor trustee. ...

...The widow [petitioner] did not comply with a court order to turn over documents related to the trust. Both the widow and the son failed to provide proper responses to discovery and repeatedly made groundless objections. The widow did not complete her deposition as ordered by the trial court, and the son did not appear for trial. After the widow and son [petitioners] attempted to take several additional depositions while the trial was in recess and mischaracterized the nature of those depositions, the trial court granted motions for terminating sanctions.

Reedy's (Plaintiff in the trial court action) third motion in limine renewed the request for issue, evidentiary and terminating sanctions against [petitioners], on each of the five petitions, based upon their continuing uncooperative and obstructive behavior, and their noncompliance with discovery obligations and court rules. ... In addition to conduct raised in prior motions, Reedy pointed out that [petitioner] and [petitioner's counsel] had continued with unreasonable behavior during a recent witness deposition, and that [petitioners] had yet to comply with the court's orders requiring them to fulfill their discovery obligations. Reedy pointed out she was substantially prejudiced by her continued inability to get the business records maintained by [original trustee] during his tenure as trustee of the trusts.

...The continued hearing on the noticed sanction motion took place a week later, on March 25, 2005. At that time, the court again continued the motion for

sanctions, directing that it "be heard with the accounting trial," and advised the parties "you can make your arguments to that judge."

...The trial began as scheduled on March 30, 2005, and the court first noted, in connection with the default motions in limine, that as it had no filed copy of any requests for entry of default against Letantia and Todd relating to Reedy's petitions, it would proceed on the merits of those petitions. The court also informed the parties it was familiar with the motions for sanctions, including terminating sanctions, as well as [Petitioner's] "somewhat summary denials"—denials it then characterized as a "somewhat shallowless[*sic*]-than-probing response to an otherwise very specific and amplified liturgy of complaints with respect to what went on in the discovery process." The court explained, however, that rather than ruling on the request for terminating sanctions, it would take the sanctions motions under submission, and if, during the course of trial it determined Reedy had been prejudiced "in a significant way" by Letantia and Todd's "stonewalling," it would take that into consideration on an "issue-by-issue basis in determining whether or not sanctions would be appropriate."

The trial did not proceed smoothly. Over Reedy's objection, [petitioner] continued to represent herself individually, while allowing [counsel] to represent her in her capacity as trustee of the trust she had established with [her deceased husband]. Her enthusiasm for the role of trial attorney far exceeded her skill, and she was singularly undaunted by the cascade of sustained objections to her questions. Although the court was unfailingly polite and respectful to Letantia, she nonetheless accused it of bias against her, of committing "continued judicial

misconduct," and ultimately sought to have the court recuse itself.

The obstreperous conduct continued, however, as did the court's warnings. At one point, the court warned Letantia that her trial conduct "dovetail[ed] in with the difficulty [Reedy] has had with discovery and obtaining responses to discovery. And the court has taken their motion for terminating sanctions under submission. But the more this trial goes on, I feel their position has merit."

...The trial court's written tentative ruling made clear it found [pettioners'] contention that their sudden spate of new discovery was intended to relate to the *other* petitions (which were not yet even set for trial) to be incredible. Consequently, its tentative decision was to quash the subpoenas, and impose both monetary sanctions and terminating sanctions.

With respect to the imposition of the terminating sanctions, the court's tentative ruling explained that it had given [petitioners] the opportunity to proceed at trial, despite the "virtually unopposed" motions in limine spelling out the case for terminating sanctions. However, their performance in that trial, as well as their "inappropriate" attempted discovery, were both factors in its ultimate decision to terminate the case.

At the hearing, [the court] announced that "the tentative ruling is hereby made the order of this court."

Trial court's tentative:

GRANT Motion to Quash. GRANT Motion for Terminating Sanctions.

The court has reviewed the Motions in Limine previously taken under submission. The court finds that the documents submitted by and on behalf of respondents do not constitute legal opposition to the

> motions. The court took these motions under submission to provide respondents with the opportunity to proceed with the litigation in compliance with the proper procedure, both in connection with the presentation of evidence at trial and the implementation of appropriate motions. The trial presentation of respondents during the first four days of trial was unduly time consuming and substantially ineffective with respect to the issues delineated by the court in the first part of the bifurcated proceedings. The attempted discovery implemented by respondents was inappropriate as set forth in the petitioner's motions and supporting declarations. The court considered these factors in light of the virtually unopposed Motions in Limine. (see Appendix, page 1)

Petitioners appealed and The Court of Appeal of California, Fourth Appellate District, issued its ruling on February 23, 2007. Petitioners petitioned for rehearing and the Appeals Court denied on March 26, 2007. (see Appendix, page 35)

The following is a direct quote of the pertinent portions of the decision of the California Appellate Court in its published opinion. The only exceptions being insertions made for the purpose of clarification of parties:

> [Petitioners] next argue that terminating sanctions were unwarranted, because there was no substantial evidence they willfully violated any court orders, and the court failed to "expressly find that Appellants had violated [a] court order before imposing terminating sanctions." We must again disagree.
>
> Initially, we note that willfulness is no longer a requirement for the imposition of discovery

sanctions. [citations] That requirement was dropped from [statutes]. [citations]

Petitioners] next assert the court's decision to impose terminating sanctions was an abuse of discretion, and "violated the fundamental policy of resolving cases on their merits." Again, we disagree. Indeed, this case seems to illustrate the old adage that "no good deed goes unpunished." In our view, the court bent over so far backward in its effort to ensure this case would proceed on the merits—to give [petitioners] every benefit of the doubt, and every opportunity to ultimately comply with their obligations—that they began to believe their conduct was somehow acceptable. So they just kept pushing.

Their final effort; i.e., the attempt to schedule *11* depositions in the week prior to recommencement of the trial in this case, coupled with the flatly and literally incredible assertion the discovery was suddenly being sought in connection with *other petitions not yet scheduled for trial*, was understandably the last straw. In the face of such an effort, the court could neither continue giving [petitioners] the benefit of the doubt, nor could it reasonably assume that some lesser sanction (such as additional monetary penalties) would be sufficient to curb their continued abuses.

"The court's discretion to impose discovery sanctions is broad, subject to reversal only for manifest abuse exceeding the bounds of reason." [citations] The circumstances of this case do not demonstrate such an abuse. The record here demonstrates the [petitioners] were recalcitrant in virtually every aspect of discovery, and failed to either produce documents or provide proper written answers to discovery. [Petitioner] did not complete her deposition as ordered by the court, and [other Petitioner] did not appear for trial, despite a notice

requiring him to do so. Their obstinacy continued during trial.

Of course, [petitioners] contend on appeal that the court could have "better tailore[d] the sanctions to 'fit the crime,' " and we generally agree that such an effort should be made. [citation] However, this was not a case, ... in which the discovery violation was limited to a single request ... [petitioners'] obduracy was plenary. Moreover, they make no effort on appeal to suggest exactly how the court might properly have tailored its sanction order to more properly fit their "crime," nor why we should conclude that such a sanction would have been effective. We find no abuse of the court's discretion. (see Appendix, page 24)

The appeals court did not address the issue of failure of constitutional due process raised by Petitioners. Neither did the court address how, what the court describes as discovery shenanigans or misconduct, was material to the disposition of Petitioners' claims and defenses.

On June 13, 2007 the Supreme Court of California denied a petition for hearing. (see Appendix, page 36)

REASONS FOR GRANTING THE PETITION

Introduction

If a litigant's right to be heard is removed due to discovery sanctions, with no finding of the necessary presumptions of material facts determinative of all causes of action, has due process been satisfied as prescribed by the Constitution? Is it preferable for a litigant to suffer injustice than for the court to

be inconvenienced or suffer some perceived disrespect?[2] These questions go to the heart of the matter presented to the Court.

Specific individual cases or anecdotal considerations are not appropriate for the question of regulating the conduct of discovery. Bad behavior and recalcitrant litigants we will always have and this must not allow us even to deprive such party of due process of law.[3] The court must use a higher scope of information and deliberation to provide the guidelines for fair and orderly discovery procedure. The heart and soul of the issue presented herein is the due process rights of individuals in the United States of America. This must be the broad guiding principle that lights the way. More specifically, the question is how those due process rights are protected by the courts in the process of meting justice and facilitating the need to manage the courts' business.

"Each person possesses inviolability founded on justice that even the welfare of society as a whole cannot override."[4] When of a person's right to participate is removed, even in the furtherance of a compelling government interest, it constrains us as a free democratic country to make certain due process rights have not been trampled. This is a concern of constitutional dimensions.

This Court has best characterized the concern for due process rights and how that intersects with sanctions for discovery abuse, in *Societe Internationale v. Rogers,* 357 U.S. 197, (1958). "The provisions of [discovery rules] authorizing a ... Court to dismiss an action for noncompliance of the plaintiff with a production order of the

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[2] Freedman, *Our Constitutionalized Adversary System*, 1 Chap. L. Rev. 57 at 86 (Spring 1998)

[3] *Caryl Richards, Inc. V. Superior Court*, 188 Cal. App. 2d 300, 305 (2nd App. Dist. 1961)

[4] Rawls, *A Theory of Justice, revised*, p. 3 (2003)

court must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law; there are constitutional limitations upon the power of courts, even in aid of their own valid process, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*, 209

The issues presented herein are badly in need of the Supreme Court's authoritative voice. It has been twenty-five years since the Supreme Court addressed discovery sanctions under applicable court rules.[5] In the years since that decision, the state courts of last resort and federal district and appellate courts have had no further direction on policies and procedures for imposing sanctions. The trend has clearly been toward a liberality in the application of "death penalty" sanctions and a tendency to adopt far more subjective bases for such.[6]

As set forth below in more detail, the various state courts of last resort have a wide variety of conflicts in their approach and application of the law both among themselves and among they and the federal appellate courts. In light of the lack of objective criteria provided by the Supreme Court, the lower courts have struggled to find the proper harmony between the need to control discovery misconduct and the need to ensure a party has his "day in court." There is need for national uniformity in applying due process constitutional rights to the process of enforcing discovery rules.

The decision of the lower court herein should not be allowed to stand. Petitioners maintain their claims and defenses have been adjudicated based only upon the conduct

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[5] Slowatsky, *Rule 37 Discovery Sanctions – The Need for Supreme Court Ordered National Uniformity*, 104 Dick. L. Rev. 471 (Spring 2000)

[6] Golinsky, *The Second Circuits's Imposition of Litigation-Ending Sanctions For Failures To Comply With Discovery Orders: Should Rule 37(B)(2) Defaults and Dismissals Be Determined By a Roll Of The Dice?*, 62 Brooklyn L. Rev. 585 at 585-586 (1996).

of discovery and without any regard to the merit of their case; they have been denied their right to due process. In a wider perspective only more confusion will result in the present muddle about exactly how the issues should be handled.

The instant case would be a good case to be used for this purpose as it is very apparent the lower court, in making its decision, viewed petitioners as bad litigants and used that criteria for its decision rather than ruling on the merits.

Petitioners do not make any argument that sanctions should never be imposed, but base their argument on the proposition that dismissal sanctions are an extreme remedy and should be carefully balanced with due process rights.

There Are Many Conflicts In The Lower Courts, Both Federal And State, As To Whether Imposition Of Case-Determinative Discovery Sanctions Requires A Presumptive Finding That The Offender's Claims Or Defenses Lack Merit.

Even a cursory examination of the lower court cases will show a wide variety of guidelines used for the imposition of death penalty sanctions.[7]

In a law review article dated 2000, "Nearly a quarter century has elapsed since the Supreme Court last addressed in a significant fashion discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure. In the ensuing years, the federal district and appellate courts have been without further guidance with respect to policies and procedures for sanction imposition. ... dearth of Supreme Court opinions on discovery sanctions..."[8]

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[7] Golinsky, *The Second Circuits's Imposition of Litigation-Ending Sanctions For Failures To Comply With Discovery Orders: Should Rule 37(B)(2) Defaults and Dismissals Be Determined By a Roll Of The Dice?*, 62 Brooklyn L. Rev. 585 (1996).

[8] Slowatsky, *Rule 37 Discovery Sanctions - The Need for Supreme Court Ordered National Uniformity*, 104 Dick. L. Rev. 471, 471 (Spring 2000)

Petitioners have provided a brief review of the approach of courts in several states[9] and of several federal circuit courts.[10] This review is specific to the level of, or absence of, attention given to any requirement of a finding the discovery abuse justifies a presumption the offender's claims or defenses lack merit.

California – "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [citations] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply, conceded here by appellant; and (2) the failure must be wilful [citation]." (*Calvert Fire Ins. Co. v. Cropper*, 141 Cal.App.3d 901, 190 Cal.Rptr. 593; (Cal.App.1st 1983).) Not only did the court ignore any concerns about materiality of the subject but also held defendants who did not propound interrogatories to the plaintiff were nevertheless entitled to a dismissal of the action against them as a sanction for the plaintiff's failure to respond to interrogatories propounded by another defendant. (*Id.* Page 905) There is no attention given to the merit of the offender's claims and defenses. This is typical of the stance taken by California. It is a rather open and free-wheeling approach to applying doomsday sanctions for discovery problems.

A check of this case being cited, through Shepard's, leads one to 24 other appellate court rulings that have followed this reasoning in the rulings regarding imposition of extreme discovery sanctions.

As an example, one ruling takes the "only two facts" holding and applies it, "...here the trial court finds the essential fact of willfulness, that finding is entitled to deference on appeal." [citations] (*Sauer v. Superior Court*,

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[9] 14-9 *Bender's Forms of Discovery Treatise* § 9.09 (2007)

[10] Relying heavily on: Slowatsky, *supra*

195 Cal. App. 3d 213; 240 Cal. Rptr. 489; (Cal. App. 4th 1987).)

Even though California seems to have reached this "open door" point, at one time the courts there did express great concern for due process rights. "While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law." (*Caryl Richards, Inc. V. Superior Court*, 188 Cal. App. 2d 300, 305 (2nd App. Dist. 1961).) Something appears to have happened to due process in the interim 35 years.

New York - This state overflows with rulings in support of litigation-ending sanctions. No less than eleven appellate decisions in the last twenty years strongly support the use of extreme sanctions.[11] One example that seems to embody this attitude is stated: "Regrettably, it is not only the law but also the scenario that is all too familiar [citations]. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders ... as are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully." (*Kihl, v. Honda Motor Co., Inc.*, 94 N.Y.2d 118 (NY SupCt2nd 1999).) Only the process is paramount.

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[11] See 14-9 *Bender's Forms of Discovery Treatise* § 9.09 (2007)

"Although actions should be resolved on the merits wherever possible [citation], a court may, inter alia, strike the 'pleadings or parts thereof' as a sanction against a party who 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed [upon notice]' (*Mendez v. City of New York*, 7 A.D.3d 766 (NY App2d 2004).)

Others seem to be very mixed, as Texas:

Texas - This state seems to hold strongly in opposition to a "trial by sanctions" unless the appropriate presumption that claims or defenses lack no merit. In a 1991 case, the Supreme Court of Texas strongly held that "death penalty" sanctions cannot be imposed without a finding of materiality. "Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. [citations] However, if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it. [citations] Although punishment and deterrence are legitimate purposes for sanctions, [citations]; they do not justify trial by sanctions, [citations] (*TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex 1991))

However, in at least two subsequent cases no consideration is given to the issue of materiality. "What matters is that at the time of the hearing on the motion for sanctions, appellant was in noncompliance with two previous court orders." (*Jefa Co. v. Mustang Tractor & Equip. Co.*, 868 S.W.2d 905, 909 (TexApp 14 Dist 1994). Writ denied) In this case, all that mattered was noncompliance with court orders.

In another case, although they did overturn the trial court's imposition of sanctions on other grounds, there was no mention of materiality issue. The only concern was "...flagrant bad faith and that their counsel has exhibited a callous disregard for the responsibilities of discovery"

(*Electronic Data Sys v. Tyson*, 862 SW2d 728, 739 (TexApp 5th Dist 1993).)

There appears to be no clear standard of constitutional due process by which the courts can measure the imposition of a "death penalty" sanction.[12]

Illinois - Illinois has a specific materiality requirement that the sanction must relate directly to the issue, "(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice..." (Rule 219(c)(5) (emphasis added)

"We believe that [discovery statute] must be interpreted as authorizing pleadings to be stricken only when the stricken pleadings bear some reasonable relationship to the information withheld. [citations]" (*People ex rel. General Motors Corp. v. Bua*, 226 N.E.2d 6 (Illinois 1967).)

Kansas - A Kansas Appellate Court provides that state's approach. In Fields v. Stauffer Publications (2 Kan.App.2d 323; 578 P.2d 1138 (Kan.Ct.Appls. 1978).) the court explained how the appellate courts had made several rulings, providing guidelines. This is immediately followed, "Initially it must be ascertained whether the discoverable material goes to a dispositive issue in the case. Clearly in the case at bar the question does not go to a dispositive issue.' (Id. page 329) The court proceeds to uphold the dismissal sanctions because the trial court had no other appropriate sanction. So, despite the fact that the discoverable material did not go to a dispositive issue, the death penalty sanctions were imposed.

Florida - In a case indicative of Florida's approach to discovery sanctions, the court stated, "A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, [citation], as will bad

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[12] Miller, *"Death Penalty" Sanctions*, 46 Baylor L. Rev 737 (Summer 1994)

faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness..." (*Herold v. Computer Components International, Inc.*, 252 So.2d 576 (Fla. 4th DCA 1971).)

Curiously, when discovery statutes are not involved, issues of fact which are entirely unaffected by the missing information raise a due process question. In a case where the issue was missing records, but not where discovery was an issue, "...the conclusive presumption establishing liability because records were missing was violative of due process because it failed to provide defendant the opportunity to rebut... We stress this point in order to avoid the potential problems involved in confusing the absence of the records with the true issues at trial. [Absence of] records does not necessarily bear at all on the question of whether the medical procedure involved has been conducted negligently. (*Public Health Trust v. Valcin,* 507 So. 2d 596 (Fl. 1987).)"

Minnesota - An appeals court here approved dismissal for discovery abuse on the basis of contempt, first acknowledging Hammond as prohibiting use of such severe sanction as a penalty, but imposing it anyway.

The trial court mentioned dismissal with prejudice "...'as punishment for its lack of good faith and contempt of the judicial process.' *Hammond* prohibits this severe sanction as a 'mere penalty', but the 5 year duration of this lawsuit, the fact that five or six different attorneys were involved, and the number of customers of the parties give strong indication that this order will be a deterrent to others to engage in conduct like Anderson's designed to thwart the orderly progress of litigation." (*Deutz & Crow Co. v. Anderson*, 354 N.W.2d 482 (App.Ct. 1984).)

New Mexico – In a 1981 case the New Mexico Supreme Court upheld an entry of default judgment for bad faith in the discovery process. The offending party attempted to make a case that the materiality of the subject discovery did not justify disposal of the entire case, "...such information could not have been dispositive of every issue in the case.

Therefore, it argues that an across-the-board default judgment amounted to "mere punishment," in contravention of settled principles of constitutional law. [citation]..." The Court responded by continuing, "The default judgment was entered as a result of a course of misconduct in discovery which began at the very outset of the case and ended only with the entry of that judgment. Although it is settled that discovery sanctions cannot be entered as "mere punishment," all such sanctions involve an element of punishment. ... It is "[o]nly where the sanction invoked is more stern than reasonably necessary" that a denial of due process results. [citation] In light of the nature of [defaulted party's misconduct, the element of punishment involved here does not rise to the prohibited level of reprisal." (*United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155; 629 P.2d 231 (N.M. 1980 N.M.).)

Wisconsin - This state clearly addresses due process as it applies to discovery sanctions. They require a direct connection between the subject of the discovery procedure and the claims and defenses that may be dismissed. "Due process dictates that a trial court may not dismiss a case in its entirety where only a portion of the claims has been affected by the destruction of documents. '...when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law.' [citation]" (*Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis. 2d 523 (WisApp 1993)

Second Circuit – "Although entry of a default judgment is an extreme measure, discovery orders are meant to be followed. 'A party who flouts such orders does so at his peril.' [citation] Defendants rolled the dice on the district court's tolerance for deliberate obstruction, and they lost. We have no intention of letting them return to the table. 'If one suggests that our decision today is strong medicine, that is

precisely what it is intended to be.' *Id.* This is not the first time such potent medicine has been prescribed. [citations] (*Bambu Sales v. Ozak Trading*, 58 F.3d 849 (2d Cir. 1995) No discussion of materiality or due process whatsoever. It's just mess-with-us-and-you'll-suffer.

Third Circuit - This circuit sticks to the guidelines of *Hammond*, "Rule 37(b)(2) 'embodies the standards established in *Hammond* [citation], for the due process limits on' rules providing for discovery sanctions. Those "two standards -- one general and one specific -- . . . limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." [citation] (*General Ins. Co. of Am. v. Eastern Consol. Utils*, 126 F.3d 215 (3rd Cir 1997).)

This seems to be one of the few circuits to give any consideration to due process and the merits of the underlying issue.

Tenth Circuit - This court appears to have abandoned the idea of materiality of the discovery at issue and pled claims.

In Ohio v. Arthur Andersen & Co. (570 F.2d 1370; 24 Fed. R. Serv. 2d 1139 (3rd Cir 1978).) (criticized on other bases) the court recognized the offending party had argued, "...the use of preclusionary sanctions is premised on the presumption that the information withheld would have supported its opponent's case and that the presumption is not applicable here..." (*Id.* page 1374) but never responded to this issue, simply asserting, "The record before us shows both flagrant bad faith and callous disregard. Rule 1, F.R.Civ.P., provides that the Rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.' The trial courts must administer the rules to attain the proclaimed objective." (*Id.* page 1376)

There is curious and total lack of considering the materiality of the subject discovery.

Eleventh Circuit – This circuit seems to ignore any materiality question. They do not consider whether there

may be a connection, between any discovery abuse and the issues in dispute. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir.), cert. denied, 510 U.S. 863 (1993).) this circuit mentions three factors that trial courts may use in evaluation of litigation-ending sanctions: (1) while district courts have discretion, severe sanctions require willfulness or bad faith; (2) the sanction must satisfy due process considerations by being "just;" and (3) severe sanctions must be weighed against invoking less severe sanctions. None of these address a need for a finding of presumption the offender's claims or defenses lack merit.

DC Circuit – This circuit seems to take pride in the proliferate use of litigation-ending sanctions, seemingly without regard to hardly any criteria. "[D]elays and postponement occasioned by discovery abuse affect not only the clients of the counsel in question but many other litigants One irresponsible attorney's repeated delays cause a ripple effect of delay and postponement in the Court's entire calendar. ... Despite the original reluctance of many courts to impose sanctions, the Supreme Court's opinion in *National Hockey League* is believed by some to be a turning point in the philosophy of discovery sanctions. [citation] In any case, the Court's admonition to "diligently" apply the appropriate sanctions, *Roadway Express,* 447 U.S. at 766, has been heard in the lower courts, and an increasing number of federal courts have imposed or upheld discovery sanctions such as that imposed today. [citation]" (*Butler v. Donovan*, 103 F.R.D. 456 (DC Dist 1984)

As one can readily see, variations among the lower courts are profuse on the question of whether materiality is a criteria for imposition of extreme sanctions for discovery abuse. Some courts ignore the issue. Some courts seem to simply touch on the issue in a tangential way. Other courts clearly view such finding as a constitutional requirement.

Discovery Developments In The Last Twenty Years Have Caused A Need For The Authoritative Voice Of The Supreme Court On The Question Of Due Process And Its Application To The Use Of Case-Determinative Sanctions.

The frustration with the absence of clear direction is characterized in a law review article by a law clerk to a District Court Judge in the Eighth Circuit, "The Eight Circuit has a good start on setting forth elements for trial judges to follow. However, those elements should be clearly expressed and not hidden throughout several opinions and patch-worked together."[13]

A brief review of the history of the Court's rulings in the area of discovery sanctions would be appropriate.[14]

Two seminal U.S. Supreme Court cases provide insight into how FRCP 37 was originally fashioned-- Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897) and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-54, 29 S. Ct. 370, 379-81 (1909). In Hovey the Court held that refusing a party the right to defend an action on the merits, absent a hearing, denied the defendant due process. In Hammond, the Court substantially modified Hovey. There, the Court affirmed a judgment that struck a party's answer and entered default judgment for its failure to produce books, papers and witnesses in a state antitrust suit. In distinguishing Hovey, the Court noted that due process had been denied in that case by the court's refusal to hear the party. In a post-FRCP 37 case, *Societe Internationale*, (*supra* note 7), the Court held that due process prevents the harshest of sanctions where the party to be sanctioned is unable to comply with a court's discovery

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[13] Bough, *Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 South Dak. Law Rev. 36 (1998)

[14] This iteration relies on *Payne v. Dewitt*, (995 P.2d 1088, 1093 (Okla. 1999).)

order. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, and National Hockey League (supra) the Court granted district courts considerable discretion to impose the extreme sanction of dismissal or default where there has been flagrant, bad faith disregard of discovery duties. In Link, the Court upheld a dismissal for an attorney's failure to appear at a pretrial conference where the record reveals a course of protracted neglect. (*Id.*, at 1390.) In National Hockey League the Court upheld the district court's default judgment under FRCP 37 for the respondent's failure to respond timely or adequately to interrogatories. (Supra at 2781.

There seems to be lack of clarity as to whether due process remains a consideration. As set forth in the preceding section, there are a wide variety of applications, nonapplications and misapplications of this principle. The Supreme Court should clearly articulate its instructions in this matter.

It Is A Trespass of Due Process Rights When Discovery Sanctions Serve To Adjudicate Claims Based On The Manner In Which Discovery Is Conducted And Not Based On Their Merits.

This Court has stated this concern—protection of due process as it applies to discovery matters—in ringing tones:

> Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be

violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent. [citation] "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." ... [citation] "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'".... (pp 417-418)

...There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files. (*Hovey v. Elliott., supra*, 446.)

In like manner, in the Hammond decision, the Court tied a failure to produce evidence to the materiality of the issues. "[The] preservation of due process was secured by the

presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." (*Hammond Packing Co. v. Arkansas, supra,* 350-351.)

As a result of the pressure to deal with the problem of discovery abuse, the increase in the use of sanctions provisions may have inadvertently increased abuse. Unfortunately the victim seems to have been due process rights. The procedure has gained a life of its own at a very costly expense.

A good argument could be made that sanctions provisions have served to increase abuses. Sanctions provisions are procedural rules, and like all procedural rules, sanctions provisions are susceptible to manipulation.[15] Sanctions provisions prescribe the punishment that a court must inflict upon a lawyer who has performed inadequately or improperly. So, sanctions are not just a potential tool for evasion, but also a potential bludgeon against opposing counsel.[16] Hardball litigators have learned to use sanctions provisions affirmatively and if the courts are serious about reducing hardball tactics, then absent the most egregious circumstances, the courts must divorce punishment from the adversarial process.[17]

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[15] Herring, *The Rise of the "Sanctious Tort,"* Tex. Law, January 28, 1991

[16] Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment,* 57 St. John's Law Rev. 680, 718 (1983) at 721 ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions."); *cf.* Dettmer, *Observations on Professionalism,* 68 Mich. B.J. 842, 843 (1989) ("Increased judicial pressure imposed on our profession [from sanctions and growing malpractice problems] causes us to lash out against each other.").

[17] Keeling, *A Prescription for Healing the Crisis In Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct,* 25 Tex. Tech L. Rev. 31 (1993)

When it comes to the resolving the claims and defenses of a particular case, the emphasis must not be on whether the party has conducted his discovery properly, but whether there is merit to his claims or defenses.

Despite The Zeal Felt By The Judicial System To Deal With The Problems Of Discovery Abuse, Courts Cannot Afford To Fall Into The Trap Of Disregard Of Due Process Rights

It sometimes seems the discovery process has acquired an inherent sacredness, in and of itself, to which homage must be paid. Eminent legal scholar Geoffrey C. Hazard, Jr. (Trustee Professor of Law at the University of Pennsylvania), author of articles and books regarding the American legal system has observed that discovery has become, for our judicial system, more than a mere procedural rule, but a procedural institution.[18] As a country we must not lose sight of the need to view the enforcement of necessary rules through the lens of due process constitutional rights.

While petitioners concede our judicial system has a problem with discovery issues,[19] perhaps the focus has been in the wrong arena. Can it be that we are too focused on making certain everyone complies with each detail of the discovery rules, and that we are not paying enough attention to whether the discovery is itself appropriate?

There must be a balance between the need to deal with these discovery problems and the need to preserve individual due process rights.[20]

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[18] Hazard, *From Whom No Secrets are Hid*, 76 Tex. L. Rev. 1665, at 1694 (June 1998)

[19] Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483 (Summer 1987).

[20] Freedman, Our Constitutionalized Adversary System, 1 Chap. L. Rev. 57 at 86 (Spring 1998)

The instant case may very well be a prime example of the enthusiasm of a court, in the midst of frustration and perhaps motivated by personal dislike, dealing with discovery abuse in a manner that indicates a loss of respect for a litigant's due process constitutional rights. Not only did the trial court enter default against Petitioners without a finding of the necessary presumptions of material facts determinative of all causes of action, but the trial court also entered default judgment when the petitions did not even specify a particular amount of damages. The appeals court reversed and remanded on the latter issue. This is a strong implication of the trial court's over enthusiasm.

As the courts have felt the pressing need to deal with the real problem of discovery abuse, it seems one can see a gravitation toward a very free hand for trial judges to dismiss a matter for discovery abuse based on their own subjective feeling and criteria.

"In 1970, the prerequisites for imposing sanctions were redesigned 'to encourage judges to be more alert to abuses occurring in the discovery process.' [citation]... While the amended rule retained the substantial justification requirement, the placement of the requirement was changed so that the rule provided that the district court, upon granting the motion to compel, "shall" impose the sanction unless it found that the losing party's conduct was 'substantially justified.' The change in placement signaled a shift in presumption about the appropriateness of sanctions for discovery abuses." (*Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1991).)

The wise words of an Illinois Appellate Court are appropriate. The appellate court recognized that the trial court had become frustrated by delays, found an abuse of discretion by the trial court in imposition of terminating sanctions for discovery abuse, and commented "[W]e must not allow personal frustration alone to be the cause for dismissal." (*Walton v. Throgmorton, supra*) (emphasis added)

Petitioners suggest that as a result of the pressing need to deal with the real problem of discovery abuse, the *National Hockey League* decision has been misconstrued. The Court sided with the trial judge, stated that discovery sanctions were for the purpose of not only punishment but deterrence also, and then named abuse of discretion as the only basis for overturning such order. Many interpreted this to give carte blanche to trial court judges to create their own more subjective criteria for imposition of case-determinative sanctions. Some illustrations of resulting confusion follow.

California appears to have "opened the door" very wide and took the stance that trial courts have a "...wide discretion ... is granted broad discretionary powers to enforce its orders..." and that a trial court's use of discovery sanctions is "...subject to reversal only for arbitrary, capricious, or whimsical action." (*Vallbona v. Springer, supra,* 1545.)

It seems New York has embraced the concept of extreme discovery sanctions as in the sole discretion of the trial courts. "...the penalty to be imposed on a motion pursuant to [statute] is a matter of discretion with the court [citations] "striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" [citations] (*Herrera v. City of New York*, 238 A.D.2d 475, 476 (1997).)

Illinois is an admirable exception in that it requires the sanction must relate directly to the issue. "(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice..." (*Illinois Supreme Court Rules*, Rule 219(c)(5).)

The Seventh Circuit is very proliferate in regard to rulings on litigation-ending sanctions. The only real criteria to be found is that a "degree of egregiousness" would be necessary. (*Stafford v. Mesnik,* 63 F.3d 1445 (7th Cir. 1995).)

The Tenth Circuit uses this criteria: (1) the degree of actual prejudice to the adversary, (2) the interference with the

judicial process, (3) the culpability of the offending party, (4) whether the party was warned, and (5) the appropriateness of lesser sanctions. (*Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995).) Where is any significant recognition of due process rights?

The solution to this problem may be that the Court more clearly delineate the criteria suggested in *Insurance Corporation of Ireland, LTD. v. Compagnie des Bauxites, supra*, that the sanction for failure to comply with discovery be tied directly to the party's need to meet its burden of proof.

The idea of a material connection between discovery and claims set forth was visited in 1991, by the President's Council on Competitiveness (*Agenda For Civil Justice Reform In America* (1991).) One of their proposed reforms was to require the parties to tie a discovery request directly to a claim or defense. Petitioners suggest this should be a necessary finding by any trial court issuing doomsday sanctions—the sanction must specify how the discovery in question ties to the claim being disposed.

The consideration of discovery abuse in the decision to issue a "death penalty" sanction should require a finding that the party's discovery conduct justifies a presumption that its case lacks merit

Once again, the instant case, which is the subject of this petition, is a perfect example of the tendency to become frustrated and make a decision for terminating sanctions on the basis of a subjective discretionary finding. Petitioner suggests the underlying motivation for default in this matter was a dislike of litigants. There was no effort to connect the failure to comply with discovery with a need to meet a burden of proof. Difficult and unruly behavior is no reason, nor is there any acceptable reason, to deny due process rights.

Is Bad Behavior Alone A Criteria In Determining Whether Extreme Discovery Sanctions Are Appropriate?

In balancing the need to preserve the due process rights of a litigant with the need to manage the courts' business, one must realize the costs are very different. Petitioners cannot find a measuring device to compare the constitutional due process rights of the individual with the administrative costs of government.[21]

In the case for which this petition is made, *Reedy v. Bussell, supra.*, the lower court made numerous "observations" of what could be construed as a statement that petitioners were bad litigants. The lower court used the term "obstreperous" in its description. The point to be made here is that a difficult or unruly litigant should not be the basis for a decision to invoke terminating sanctions. Is bad behavior a just criterion to be used? Is there a pressing need to actually consider the case on its merits? Is bad behavior a criteria for discovery sanctions in the form of dismissal or default? Is there a need to have the sanction relate to the particular "claim" at issue?

Petitioners repeat the words of the Illinois Appellate Court, "[W]e must not allow personal frustration alone to be the cause for dismissal." (*Walton v. Throgmorton, supra*) (emphasis added)

In like manner, the Eighth Circuit Court of Appeals overturned a trial court's order which had effectively entered terminating sanctions. The Court stated, "The remedy granted by the trial court, coming on top of the dismissal of plaintiffs' case, is a very harsh remedy. This is particularly true as ... it seems clear the trial court reached its decision largely upon the basis of the atrocious conduct of ...There is a strong policy favoring a trial on the merits and against depriving a

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[21] This question is asked by Jerry L. Mashaw, Professor at Yale Law School in *Due Process in the Administrative State*, 1985, Yale University Press, page 47.

party of his day in court. [citation]... We hold that under the facts and circumstances of this case as disclosed by the record the court abused its discretion in imposing the harsh sanction of establishing as true specific paragraphs of the counterclaim. The effect of such action was to establish liability and leave open only the issue of damages." (*Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989; 20 Fed. R.Serv.2d 248 (8th Cir. 1975).) (emphasis added)

Conclusion

There is wide conflict among lower courts, both state and federal, on this issue. Both to resolve these conflicts and to review the constitutional questions of proper use of such extreme sanctions as dismissal or entry of default, the Court should give review.

In determining whether case-determinative sanctions are appropriate the Court should consider whether there has been some desertion of the due process rights guaranteed by the Fourteenth Amendment. It is imperative that the method of enforcement of discovery rules be used in deep consideration for a litigant's constitutional rights. This Court has emphasized this principle, "The provisions of [discovery rules] authorizing a ... Court to dismiss an action for noncompliance of the plaintiff with a production order of the court must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law; there are constitutional limitations upon the power of courts, even in aid of their own valid process, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." (*Societe Internationale v. Rogers, supra*, 209.)

In 1906, Roscoe Pound, later to become Dean of Harvard University School of Law from 1910 to 1947, was speaking of the sporting theory justice, "It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to

search independently for truth and justice....It leads to exertion to "get error into the record" rather than dispose of the controversy finally and upon its merits."[22]

The Court has included deterrence as a valid purpose for discovery sanctions. (See *Roadway Express*, *supra*, 764; *National Hockey League v. Metropolitan Hockey Club, Inc.*, *supra*, 643.) In such a serious matter as the consideration of extreme litigation-ending sanctions, which necessarily involves the paramount question of constitutional due process rights, is there an undesired consequence that justice appears to be done when justice is not actually done?

In the instant case, the California Appeals Court describes Petitioners' attitude as "make me." Is the court motivated in its decision to take an "I'll show you" attitude, rather than seeking to see justice accomplished?

The entire concept of terminating sanctions for discovery abuse may in fact be an act that makes us feel as if we are doing something about the problem of discovery abuse, when in the process we have in large part only succeeded in trampling litigants' due process rights.

Respectfully submitted,

Date: September 10, 2007

William A Salzwedel

William A. Salzwedel, Esq.
Attorney for Petitioners

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[22] Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, Reports of the American Bar Association, Vol XXIX, 1906, Part 1, pp. 4-5.)

APPENDIX

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
MINUTE ORDER
Department: 1R SID C-67

COURT CONVENED AT : 1:30 p.m.
ON: August 12, 2005
JUDGE/COMM: ROBERT D. MONARCH CLERK: SUSIE GARCIA
BAILIFF: GENE ARTLE
REPORTER: MARILYN GLENDENNING, CSR #2273

AND THE FOLLOWING PROCEEDINGS WERE HAD:

A217515 consolidated with A218588 (coordinated with A219334)	JACQUELINE B. REEDY, TRUSTEE OF THE HELEN CHAMNESS BUSSELLFAMILY TRUST-INITIAL TRUST, dated 7/30/1982 vs. LETANTIA B. BUSSELL, TRUSTEE OF THE BUSSELL FAMILY TRUST, dated 8/18/1992; LETANTIA B. BUSSELL, AN INDIVIDUAL

MOTION TO QUASH DEPOSITION OF CAROLYN D. DOTSON AND FOR IMPOSITION OF SANCTIONS

EX PARTE MOTION TO CANCEL DEPOSITION SUBPENAS AND SUBPENAS DUCES TECUM AND FOR IMPOSITION OF SANCTIONS

Petitioner present by counsel Bernard A. Leckie. Respondents, Todd Bussell and Letantia B. Bussell, trustee of the Bussell Family Trust dated 8/18/1982, present by counsel Dana Seyler, making a special appearance for attorney William A. Salzwedel. The Court presented to counsel a written tentative ruling granting both motions, and a ruling on Motions In Limine, previously taken under submission. In open court at 1:40 p.m. Pettitioner submitted on the Court's tentative rulings. No argument by respondents. The Court's tentative rulings became the order of the Court. A copy of the Court's order is attached hereto and incorporated for reference. Trial set for 8-22-2005 at 9:00 a.m. in department 1R SID C-67 is ordered vacated, but the case will remain on calendar that date as a Default Prove Up. Petitioner's counsel to prepare the order.
Entered: 8-12-2005

A217515 consolidated with A218588 (coordinated with A219334)

JACQUELINE B. REEDY, TRUSTEE OF THE HELEN CHAMNESS BUSSELL FAMILY TRUST-INITIAL TRUST, dated 7/30/1982 **Vs.** LETANTIA B. BUSSELL, TRUSTEE OF THE BUSSELL FAMILY TRUST, dated 8/18/1992; LETANTIA B. BUSSELL, AN INDIVIDUAL

MOTION TO QUASH DEPOSITION OF CAROLYN D. DOTDON AND FOR IMPOSITION OF SANCTIONS

Court's tentative ruling:
GRANT Motion for Sanctions $3,327.50, against LETANTIA B. RUSSELL in both of her capacities and attorney WILLIAM A. SALZWEDEL, jointly and severally.

The argument in the opposition generally rationalizing the propriety of discovery in connection with petitions unrelated to the matters before this court are not supported by the declaration of William A. Salzwadel. His declaration supports only his argument that he sent the Notice of Taking Deposition in a timely manner and that he attempted to meet and confer. Further, his discovery efforts in connection with the alleged unrelated matters is patently inconsistent with his representations on the record to the effect that his time is fully occupied by having to prepare for the matters before this court as well as a matter set for trial in San Diego County in August and September, 2005, and there is apparently no trial date set in connection with the allegedly unrelated matters.

EX PARTE MOTION TO CANCEL DEPOSITION SUBPENAS AND SUBPENAS DUCES TECUM AND FOR IMPOSITION OF SANCTIONS
GRANT Motion to Quash. GRANT Motion for Terminating Sanctions.

The court has reviewed the Motions in Limine previously taken under submission. The court finds that the documents submitted by and on behalf of respondents do not constitute legal opposition to the motions. The court took these motions under submission to provide respondents with the opportunity to proceed with the litigation in compliance with the proper procedure, both in connection with the presentation of evidence at trial and the implementation of appropriate motions. The trial presentation of respondents during the first four days of trial was unduly time consuming and substantially ineffective with respect to the issues delineated by the court in the first part of the bifurcated proceedings. The attempted discovery implemented by respondents was inappropriate as set forth in the petitioner's motions and supporting declarations. The court considered these factors in light of the virtually unopposed Motions in Limine.

JACQUELINE B. REEDY, as Trustee, etc., Plaintiff and Respondent, v. LETANTIA BUSSELL et al., Defendants and Appellants.

G036327 (Consol. with G036328, G036329, G036330 & G036331)

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

148 Cal. App. 4th 1272; 56 Cal. Rptr. 3d 216

February 23, 2007, Filed

SUBSEQUENT HISTORY: The Publication Status of this Document has been Changed by the Court from Unpublished to Published March 26, 2007.
Review denied by Reedy v. Bussell, 2007 Cal. LEXIS 6386 (Cal., June 13, 2007)

SUMMARY:

The trial court entered default judgments against the widow and the son of a former trustee on consolidated probate petitions after imposing terminating sanctions at the request of a successor trustee. The successor trustee, alleging that the former trustee improperly withdrew money for his own benefit, sought to recover the money from his widow and son. The widow did not comply with a court order to turn over documents related to the trust. Both the widow and the son failed to provide proper responses to discovery and repeatedly made groundless objections. The widow did not complete her deposition as ordered by the trial court, and the son did not appear for trial. After the widow and son attempted to take several additional depositions while the trial was in recess and mischaracterized the nature of those depositions, the trial court granted motions for terminating

sanctions. (Superior Court of Orange County, Nos. A217515, A218588 and A219334, Robert D. Monarch, Retired Judge.*)

* Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Court of Appeal reversed the default judgments on two petitions that did not specify an amount of damages and remanded with directions to reconsider whether limited sanctions, relating to liability only, would be appropriate. The court affirmed the trial court's judgment in all other respects. The court concluded that any defect regarding notice of the motions was waived by failure to object and was harmless error under Code Civ. Proc., § 475, because other notices were given. The successor trustee did not seek reconsideration of prior sanction motions; hence, Code Civ. Proc., § 1008, was not triggered. Substantial evidence supported the sanctions under former Code Civ. Proc., § 2023. The trial court erred in granting default judgments on two petitions that did not specify an amount of damages. (Opinion by Bedsworth, J., with Sills, P. J., and Fybel, J., concurring.)

COUNSEL: William Salzwedel for Defendants and Appellants.

Meserve, Mumper & Hughes, Bernard A. Leckie, and Alan M. Reedy for Plaintiff and Respondent.

JUDGES: Bedsworth, J., with Sills, P. J., and Fybel, J., concurring.

OPINION BY: Bedsworth

OPINION

BEDSWORTH, J.—Letantia and Todd Bussell appeal from the judgments entered against them on five probate petitions joined for trial. These judgments followed the imposition of terminating sanctions. Letantia and Todd [23] argue, among other things, that the court abused its discretion in imposing such a draconian punishment. We disagree. Letantia and Todd's entire course of conduct in this case can be fairly summed up in two words: "Make me." Respondent Jacqueline B. Reedy had to do so repeatedly, filing motions with the court to force their compliance with discovery obligations, and at other times simply caving in to their unreasonable demands for accommodations. The court consistently gave Letantia and Todd the benefit of the doubt, and strongly indulged the policy preference for allowing matters to proceed on their merits.

Despite this, when the trial commenced, Letantia and Todd had still not fully complied with the court's discovery orders. Nonetheless, the court merely took under submission Reedy's motion for terminating sanctions, and allowed the matter to go forth. It was only after several days of trial, followed by additional discovery shenanigans, that the court finally became convinced Letantia and Todd were not going to change their ways, and awarded Reedy the requested sanctions. Based upon the record before us, we can only wonder what took it so long.

The other arguments pressed by Letantia and Todd regarding the propriety of the terminating sanctions fare no better than their abuse of discretion plea, and we consequently conclude those sanctions were not in error. However, another issue

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[23] With the exception of Jacqueline Reedy, daughter of Helen and Elmer Bussell, all of the parties, as well as additional participants in the events giving rise to this litigation, share the last name Bussell. Consequently, for the sake of clarity, we refer to each of the Bussells by first name. No disrespect is intended.

raised by Todd does have merit. As Todd points out, the court entered default judgments awarding significant monetary damages against him on two of Reedy's petitions, despite the fact that those petitions failed to specifically identify the amounts of damages he was alleged to have caused. It was error to do so, and we consequently reverse the judgments against Todd on those petitions and remand the case to the trial court for reconsideration of the sanctions against Todd with respect to them.

* * *

The five consolidated petitions in this case each relates to one of three trusts set up to benefit the family of Helen Chamness Bussell. The first trust, set up by Helen's late husband, Elmer, is the Elmer Jacob Bussell Testamentary Trust (the Elmer Trust.) The second and third trusts, set up by Helen, are collectively entitled the Helen Chamness Bussell Family Trust. That instrument includes both the initial trust, which is revocable, and the gift trust, which is irrevocable.

Helen and Elmer's son, John Bussell, was named trustee of both the Elmer trust and the two trusts created by Helen. However, in the wake of John's death by suicide in February of 2002, Helen and Elmer's daughter, Jacqueline Reedy, was named co-successor of the Elmer Trust, and successor trustee of the two Helen trusts. In that capacity, Reedy discovered what she believed to be evidence that John had improperly withdrawn money, for his own benefit, from both the Elmer Trust and Helen's revocable initial trust.

Consequently, in early 2003, Reedy filed two petitions. The first one stated several causes of action based upon John's allegedly improper withdrawals from the initial trust, and specifically identified the withdrawals at issue, including over $100,000 transferred into his personal account, over $20,000 spent on European "study-abroad" trips for John's two daughters, and $200,000 paid to an attorney representing

John in connection with criminal fraud and tax evasion charges filed against John and his wife, Letantia. The petition sought recovery from Letantia, both individually and as trustee of a separate trust which she and John had established during his lifetime. This petition also sought recovery against Todd Bussell, Letantia and John's son, alleging he had appropriated an access number issued to John as trustee of a brokerage account belonging to the initial trust, and improperly used that number to cause the sale of certain stock belonging to the trust.

Reedy's second petition alleged similar misconduct, including improper withdrawals by John, and improper use of the brokerage access number to trade stock by Todd, in connection with the Elmer Trust.

Reedy's third petition, filed in July of 2004, sought instructions from the court, and monetary contributions from trust beneficiaries for losses incurred in connection with ranch property owned by Helen's gift trust.

The other two consolidated petitions were filed by Todd. The first of these two, filed in April 8, 2003, challenged the validity of the sixth amendment to Helen's family trust, which was executed by Helen in June of 2002, in the wake of John's death. That amendment, among other things, had altered the initial trust to make Reedy its sole beneficiary, and revoked all prior amendments. This petition also sought "construction" of the fourth amendment to that trust, which purportedly contained terms which authorized John to make the trust withdrawals for his own benefit.

The second of Todd's petitions, filed in October of 2003, sought to have Reedy removed as trustee of the gift trust, alleging she was not eligible to serve under the terms of that trust. This petition also sought damages for various alleged improprieties committed by Reedy in the course of her

trusteeship, as well as an accounting and instructions. This petition also initially contained a request to quiet title to a property known as "the ranch," and to dissolve a partnership formed to own it. However, the quiet title and partnership dissolution claims were subsequently withdrawn.

By a supplement to this second petition, Todd also sought to effectuate the terms of a document which he had arranged to have 97-year-old Helen sign before a notary in January of 2004. That document purports to "release" John from any liability for his acts as trustee, to give him post hoc authorization for any and all of his acts as trustee, and to request that Reedy dismiss her petitions seeking to hold him liable for his alleged improper withdrawals of trust money. The document further contains a release in favor of Letantia and Todd, for any acts committed "both during and after the life of John Bussell," and requests that Reedy dismiss any claims against them as well. [24]

The litigation of these petitions did not go smoothly, and Letantia and Todd were represented by at least three different counsel in the course of the proceedings. Although each side accused the other of failing to properly comply with discovery obligations, Reedy appeared to have a particularly difficult time obtaining compliance. In July of 2003, she filed motions to compel answers to requests for admissions and form interrogatories from Todd; answers to requests for admissions and form interrogatories from Letantia; as well as a petition to compel Letantia to turn over documents which properly belonged to Reedy as the successor trustee of the trusts. As set forth in those motions, Letantia and Todd had objected to each and every question and request propounded

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[24] According to the man who notarized the scribble Helen placed near the signature line on that release document, he was contacted about the notarization on a Sunday, and traveled to Helen's home that night. The document was executed by Helen from her bed, *at midnight*, with all in attendance, including Todd, standing around the bed.

to them, with a litany of "irrelevant," "overly broad" and "vague and ambiguous" objections. They offered not a scintilla of information in response to the discovery. [25] Approximately a week before the hearing on the discovery motions, Letantia filed a declaration stating, in effect, that she was simply too busy to comply with her discovery obligations, and was seeking new counsel to represent her in the litigation.

On August 8, 2003, Reedy also filed a motion to compel Todd to produce documents, and for imposition of conditional terminating sanctions. This was followed by a motion to compel Todd to appear for his deposition, as well as a motion to compel Letantia to appear for a deposition and produce documents. In September of 2003, new counsel for Letantia and Todd filed a declaration in anticipation of a continued hearing regarding the various discovery motions. He explained that he had expended substantial effort familiarizing himself with the file, and assisting Letantia and Todd in preparing supplemental discovery responses. He also explained that while he had met with Letantia, on three occasions, he had yet to meet with Todd, who was under the care of a psychologist. Counsel attached to his declaration a copy of a letter, purporting to be from Todd's psychologist, which recommended that "due to the ramifications from ... his father's suicide, he be permitted to be deposed in any litigation through written questions. ..." [26]

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[25] As one example, Todd, who filed a petition in April of 2003, questioning the validity of Helen's sixth amendment to her initial trust, objected to a request for admission that Helen was "fully competent" when she executed that amendment, by claiming the request was "vague, ambiguous and not calculated to lead to the discovery of admissible evidence."

[26] Despite Todd's fragile emotional state, which allegedly precluded him from participating in normal discovery, he initiated his second petition against Reedy the following month.

The various discovery motions were continued again, and counsel kept the court apprised of their efforts to resolve some of the outstanding issues. Finally, on October 31, 2003, the matters came on for hearing. Todd was sanctioned $750 for "all the delaying tactics" leading up to the order requiring him to appear for his deposition. At that time, the court also appointed the Honorable Tully Seymour, retired, to act as discovery referee, explaining it was necessary "since you people are in here every other week regarding discovery issues."

In January of 2004, Judge Seymour issued his first report on the then pending discovery motions. He characterized Letantia's and Todd's initial interrogatory responses as a "sham," and concluded they "chose to pursue a deliberate pattern of evasion." He recommended they be ordered to answer without objection. He stated that, but for a technical defect in the request for monetary sanctions, he "would unhesitatingly recommend sanctions." Judge Seymour concluded that some of the objections initially made by Letantia and Todd to Reedy's requests for admissions were well taken, and that the supplemental responses served by substitute counsel were in "substantial compliance." He recommended denial of the motion to deem the requested matters admitted. Finally, Judge Seymour concluded that the motions to compel production of documents should be denied, in favor of additional "meet and confer" sessions. Seymour acknowledged that Reedy had been frustrated in her efforts to obtain documents, but expressed the belief that "with new counsel [representing Letantia and Todd] there is every reason to believe that discovery can proceed more smoothly."

In February of 2004, the court issued an order directing Letantia to turn over certain documents, records and other items related to Helen's family trust, accumulated by John in the course of his trusteeship, to Reedy as successor trustee.

The court also ordered that the trial of the consolidated petitions would be bifurcated, so that the issue of whether John, as trustee of the initial trust and gift trust, had authority to make the disbursements to himself and his family which had been challenged in Reedy's first petition would be tried first. The initial phase would also specifically include resolution of whether the fourth amendment to the Helen Chamness Bussell Family Trust was validly executed and an interpretation of its provisions.

In March of 2004, Letantia and Todd's new attorney petitioned to withdraw from the case. The following month, Reedy filed a motion for terminating sanctions against Letantia, based upon her failure to comply with the court's February, 2004 order requiring that she turn over the trust documents, records and other items to Reedy. In opposition to that motion, Letantia argued, in essence, that she should not have to comply with the order, because she had a "power of attorney" over Helen, which "imparts to her a burden to look after the interests of Helen ... with regard to the Initial Trust ... ." She further asserted she "has reason to know that ... Reedy will not properly account to ... Helen" and consequently that if Letantia were "to transfer all the items requested, she will have breached her fiduciary duty to Helen ... ."

In July of 2004, Judge Seymour issued an additional report concerning additional motions filed by Reedy. He recommended denial of Reedy's motion for terminating sanctions against Todd and Letantia based upon their failure to timely respond to additional interrogatories. He reasoned that although the responses were inexcusably late and filled with "sham" objections, they *were* ultimately served, and that as a consequence only monetary sanctions would be appropriate. Because of the late response, however, he concluded any objections had been waived, and Letantia and Todd should now be ordered to answer without objection.

Judge Seymour likewise recommended against imposing terminating sanctions against Todd and Letantia based upon their continued refusal to submit to a deposition. Both of them claimed to have the flu on the dates of their scheduled depositions. Judge Seymour reasoned that although "it would not be surprising [if their claimed flu] was bogus ... [they should] be given the benefit of the doubt."

Also in July of 2004, Reedy filed another motion for terminating sanctions against Letantia and Todd, this time based upon their refusal (and that of their new counsel, William Salzwedel), to comply in good faith with Judge Seymour's earlier recommendation of a "meet and confer" concerning the production of documents requested by Reedy more than a year earlier. In essence, Reedy reported that Letantia and Salzwedel had insisted Reedy's counsel appear in the early morning at a hotel in Bel Air, sit with them while they had breakfast, and left without either offering any documents or engaging in any substantive discussion.

The following month, Reedy filed a motion to compel Letantia to appear at her deposition, and sought, in the alternative, terminating sanctions based upon her failure to cooperate. In response to this motion, Letantia pointed out that she had already appeared for one day of deposition, and argued that Reedy simply had no right to more than that. According to Letantia, if a party were allowed to claim they were "not finished" at the end of the first day of deposition, and thereby compel a deponent to come back on another day, it would "render ... meaningless" the "one deposition rule" set out in Code of Civil Procedure former section 2025, subdivision (t). Letantia's counsel went so far as to assert "[t]he purpose behind the 'One deposition Rule' is to spare a natural party from more than one day of deposition." Letantia also argued that she was an insulin-dependent diabetic, and it

was consequently "unreasonable" to expect her to drive any significant distance for her deposition. [27]

On September 3, 2004, the court conducted a hearing to review the various discovery disputes, including those considered by Judge Seymour, along with his recommendations. At the conclusion of that hearing, the court informed the parties it would take all the motions under submission, but ordered that any future motions may be filed only "with leave of the court" sought by ex parte motion.

The court's orders stemming from the September 3, 2004, hearing required Letantia to appear for one additional day of deposition, before October 15, 2004. The motion to require Todd to appear for his deposition was denied as moot. Additionally, Letantia and Todd were required to respond to interrogatories propounded by Reedy, without objection, and to pay monetary sanctions. Finally, as to the outstanding document requests, the court ordered Reedy to file yet another update "as to any remaining disputed issues," and left it at that.

On September 8, 2004, Reedy informed the court that while she had prepared a trial setting conference statement, and Helen's appointed counsel had signed off on it, Letantia and Todd's new counsel, Salzwedel, had failed to do so. Letantia, acting in her individual capacity, [28] had actually refused to participate, claiming she had not been given sufficient time to

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[27] These protestations appear to be entirely inconsistent with Letantia's and Todd's insistence that Helen, at 97 years of age, submit to an open-ended deposition. After two full days, that deposition was terminated only after a protective order was sought.

[28] By this point, Letantia had fashioned a hybrid form of representation for herself in the litigation. She elected to be represented by attorney Salzwedel only in her capacity as trustee of the trust established by her and John; she chose to represent herself, in propria persona, in her individual capacity.

review it.

Unfortunately, the court's orders to Letantia and Todd regarding their interrogatory answers did not specify a particular *deadline*, and so they consequently failed **[**223]** to produce any within a reasonable period of time. Thus, in early February of 2005—*nearly six months later*—Reedy was forced to make an ex parte application to obtain a deadline for the interrogatory answers. The court then imposed a February 25, 2005 deadline.

At that point, the trial was already fast approaching, with the date set for March 30, 2005. Nonetheless, on March 4, 2005, the parties appeared in court for yet another round of motions concerning the inadequacy of Letantia's and Todd's discovery responses. Reedy again sought issue sanctions, evidentiary sanctions and terminating sanctions against Letantia and Todd, arguing that they had failed to comply with the court's September 3, 2004 order requiring them to answer the interrogatories without objection, requiring Letantia to appear for an additional day of deposition, and requiring them to pay monetary sanctions.

As Reedy explained, not only did Letantia's and Todd's latest interrogatory responses include "boilerplate" objections, but the "answers" were evasive, at best—amounting to a significant number of "I don't understand the questions" without any effort to fairly interpret them. [29] Salzwedel, the

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[29] For example, special interrogatory #1 to Letantia asked: "Has attorney William Seligman rendered any legal services to you?" Letantia's answer was "I do not know what you are referring to. I do not know what you are asking." Special interrogatory #6 to Letantia was "Please state who the Trustees are of the BUSSELL FAMILY TRUST, dated August 18, 1982." Letantia's answer was "I do not know what you are talking about." Special interrogatory #201 to Letantia was "Did you cause the sale of 2,000 shares of Lowes Corporation stock out of the Helen Chamness Bussell Trust dated 7/30/1982 to be made?" Letantia answered "I am not

new attorney, attempted to justify the inadequate response by insisting "if [Letantia] doesn't know what the question means, then she doesn't know what the question means." Salzwedel also acknowledged there was boilerplate language at the beginning of the responses, but claimed he hadn't realized it actually contained objections.

With respect to her deposition, Letantia argued that the court set a specific timeframe within which the deposition was to take place, and when Reedy did not manage to schedule it within that timeframe, Letantia no longer had any obligation to appear. Of course, Reedy's counsel countered that he had tried to notice it within the original timeframe, to no avail. Ultimately, the court continued the motion for terminating sanctions, to give Reedy's counsel time to lodge the discovery response documents with the court. He did so.

On March 18, 2005, the parties participated in a mandatory pretrial "issues conference." At that time, Reedy provided Letantia and Todd with an exhibit list (along with a compilation of the proposed exhibits), a witness list, a trial brief and four motions in limine. Her first two motions sought entry of default against both Todd and Letantia, on the grounds they had failed to timely respond to her petition in one case and one of her amended petitions in another.

Reedy's third motion in limine renewed the request for issue, evidentiary and terminating sanctions against both Letantia and Todd, on each of the five petitions, based upon their continuing uncooperative and obstructive behavior, and their noncompliance with discovery obligations and court rules. This in limine motion included a formal notice of motion

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sure whether or not there was such a sale. I do not even know if such a sale existed or if you are making it up." Todd was also asked about his involvement in the transfer of Lowes stock belonging to the Elmer Trust, and he too responded with a "I do not know what you are talking about."

with a specification of the particular sanctions requested, a memorandum of points and authorities, and a declaration establishing the factual grounds upon which the motions were based. In addition to conduct raised in prior motions, Reedy pointed out that Letantia and Salzwedel had continued with unreasonable behavior during a recent witness deposition, and that Letantia and Todd had yet to comply with the court's orders requiring them to fulfill their discovery obligations. Reedy pointed out she was substantially prejudiced by her continued inability to get the business records maintained by John during his tenure as trustee of the trusts.

Reedy subsequently filed an additional motion in limine seeking sanctions based upon Letantia and Todd's failure to fulfill their own obligations in connection with the required pretrial issues conference—she noted that in contrast to her extensive efforts, they had proffered no copies of their proposed trial exhibits (despite a list numbering almost 160), and exchanged no trial brief or statement of issues.

The continued hearing on the noticed sanction motion took place a week later, on March 25, 2005. At that time, the court again continued the motion for sanctions, directing that it "be heard with the accounting trial," and advised the parties "you can make your arguments to that judge."

Letantia and Todd filed only a cursory opposition to Reedy's motions in limine. Their opposition to the motion for terminating sanctions included only the conclusory allegation that Reedy's counsel had "committed perjury in this case on numerous occasions in his inflammatory twisted declarations," an argument that the motions had already been heard by a discovery referee, and the explanation that their counsel "cannot waste anymore [*sic*] time trying to counter the garbage in such motions." Letantia and Todd also opposed the motions in limine seeking entry of their defaults

on the petitions to which they had filed no responses. Attached to those oppositions were both a proposed answer *and a demurrer* by each of them to one of the petitions.

The trial began as scheduled on March 30, 2005, and the court first noted, in connection with the default motions in limine, that as it had no filed copy of any requests for entry of default against Letantia and Todd relating to Reedy's petitions, it would proceed on the merits of those petitions. The court also informed the parties it was familiar with the motions for sanctions, including terminating sanctions, as well as Letantia's and Todd's "somewhat summary denials"—denials it then characterized as a "somewhat shallowless[*sic*]-than-probing response to an otherwise very specific and amplified liturgy of complaints with respect to what went on in the discovery process." The court later agreed the opposition was "remarkably sparse and inadequate."

The court explained, however, that rather than ruling on the request for terminating sanctions, it would take the sanctions motions under submission, and if, during the course of trial it determined Reedy had been prejudiced "in a significant way" by Letantia and Todd's "stonewalling," it would take that into consideration on an "issue-by-issue basis in determining whether or not sanctions would be appropriate."

The trial did not proceed smoothly. Over Reedy's objection, Letantia continued to represent herself individually, while allowing Salzwedel to represent her in her capacity as trustee of the trust she had established with John. Her enthusiasm for the role of trial attorney far exceeded her skill, and she was singularly undaunted by the cascade of sustained objections to her questions. Although the court was unfailingly polite and respectful to Letantia, she nonetheless accused it of bias against her, of committing "continued judicial misconduct," and ultimately sought to have the court recuse itself.

There was also some confusion about the order in which the parties would put on their cases. Because the trial had been bifurcated, it would proceed first on the issue of interpreting the initial provisions of Helen's family trust, and the fourth amendment thereto, to determine whether John's challenged withdrawals in the course of his trusteeship were justified. This issue was raised in both Reedy's and Todd's petitions. The court indicated its tentative thinking, after reading the documents, was that the trustee would not have unfettered discretion to take whatever amounts he wanted from a trust for his personal use, and that he would have to show some evidence of authorization from either the trustor or the other beneficiaries for such withdrawals. Consequently, the court concluded Letantia and Todd should have the initial burden, as John's representatives, to demonstrate "the propriety of his actions."

Neither Letantia nor Salzwedel (Todd was not present in court) initially raised any objection to this proposal, and immediately called their first witness. The first day of taking evidence proceeded in this manner. Unfortunately, the next day brought a change of heart. When trial convened, Letantia and Salzwedel immediately moved for a mistrial, arguing that as "this part of the bifurcation has to do with the petition brought by ... Reedy ... she was supposed to go first .... [¶] ... They haven't put on their case and we are making a nonsuit on that basis." At that point, the court acknowledged that Reedy had the ultimate burden of proving misappropriation, but noted that the court had the power to direct the order of proof, and that Letantia and Salzwedel were apparently in agreement with its proposal on the prior day.

The court also explained that as it understood the case, the fact of John's questionable withdrawals was undisputed, and that consequently it made sense to proceed directly to

the evidence demonstrating the propriety of those withdrawals. Letantia disagreed with that latter point, making it clear she was insisting on formal evidence, from proper custodians of record, to establish the facts of John's expenditures, before she should have to make any effort to defend them.

The court then inquired, since Letantia and Salzwedel "are not comfortable with going first," whether Reedy was prepared to call a witness. Her counsel noted they would like to call Todd to the stand, but he was not present, despite their having served him with a notice to appear. Letantia immediately did an about-face, and responded with "We would like to call Helen Bussell as a witness right now. She was supposed to show up … ." The court was agog: "I am looking for some consistency from you. They are proceeding and your proposition that you would call another witness right now is utterly astounding." It then reverted to its initial proposal, and directed Letantia and Salzwedel to proceed with their case.

The effects of Letantia's and Salzwedel's obstreperousness were also felt as Reedy sought to introduce evidence of the payments John had made to his criminal defense attorney from the trust account. Letantia and Salzwedel objected to introduction of the checks, despite the testimony of the attorney himself regarding the payments, based upon the assertion he actually had insufficient personal knowledge of his firm's finances to authenticate the copies. The court warned them that this was the sort of prejudice it had alluded to as being significant in deciding the motions for terminating sanctions. "A lot of these foundational considerations are usually eliminated during the trial setting conference and during the course of discovery. [¶] The court is mindful of the motions in limine … and the court is now privy to what has transpired or didn't transpire or what should have transpired at the issues conference."

The obstreperous conduct continued, however, as did the court's warnings. At one point, the court warned Letantia that her trial conduct "dovetail[ed] in with the difficulty [Reedy] has had with discovery and obtaining responses to discovery. And the court has taken their motion for terminating sanctions under submission. [¶] But the more this trial goes on, I feel their position has merit."

At another point, Letantia and Salzwedel moved to exclude the trial testimony of a third party witness called by Reedy, on the basis they had subpoenaed her for a deposition and she had not appeared. The court warned them that if they were asking for it to take a hard line against discovery abuses, it would have to do the same for both sides, and gave them a chance to withdraw their request. They did so, but only on condition the court order the witness to make herself available for later proceedings.

Later, when Reedy made yet another motion for imposition of sanctions, complaining that, several days into trial, Todd had yet to appear and Letantia had yet to comply with her obligation to produce documents, Letantia made no effort to address those concerns. Instead, she again pointed out that Helen, at 99 years of age, had also not yet appeared at trial (as though that excused Todd), and both she and Salzwedel asserted that any complaints about unfinished discovery were simply untimely and need not be addressed. The court once again reminded them that the motions for sanctions, including terminating sanctions, were still under submission.

Undeterred by that warning, Letantia and Salzwedel immediately sought to call Helen as a witness, despite knowing she was not present. The court responded by tentatively deeming the then 99 year-old woman "unavailable," and suggesting the parties should rely upon her two-day deposition instead. Letantia and Salzwedel

argued vehemently that if Helen were fit enough to go out to lunch, she was fit to appear and testify at trial. The court inquired of Norbert Bunt, Helen's appointed attorney and guardian ad litem, regarding her ability to do so. Bunt responded that since the travel time between Helen's home and the court was approximately an hour and a half each way, she would likely be unable to both complete that trip and offer any meaningful testimony. The court agreed, and despite additional objections from Letantia and Salzwedel, reiterated its conclusion that Helen be deemed unavailable for trial.

After four days of trial, the parties agreed to a recess for the purpose of exploring mediation of their dispute. Unfortunately, that effort was unsuccessful, and the parties reconvened before the court on July 8, 2005, to set a date for the continued trial. Reedy filed additional papers reminding the court that her sanction motions were still under submission, and urging that they be granted in light of Letantia's and Todd's obstreperous behavior during trial, and their continued failure to comply with discovery orders. The court acknowledged that the motions had yet to be ruled on, and informed Letantia and Salzwedel that it had been "disappointed with their conduct in the trial to date." The court warned them that their trial conduct had merely "amplifie[d] and complement[ed] the ... belabored history that [Reedy has] presented, and the frustrations [she has] experienced, that would warrant a granting of the motion." Letantia responded by asserting it was too late to grant terminating sanctions, because trial was already underway.

With respect to a date for the continued trial, Reedy proposed August 22, 2005, and Letantia and Todd requested October 26, 2005. Both Letantia and Counsel Salzwedel argued strongly that they would not have sufficient time to prepare for the resumed trial by August, particularly in light of a quiet title action also scheduled for trial in San Diego. After

much discussion regarding the parties' respective positions, however, the court set the matter for the August date. Salzwedel responded by accusing the court of bias—against Letantia for her lack of training as an attorney, and against him for having less experience than Reedy's counsel. When Reedy's counsel requested confirmation that her prior requests for production of witness and documents in connection with the trial would remain in effect, Letantia merely expressed confusion, and took the surprising position "that he has received all documents, and all witnesses have been produced."

On July 27, 2005, Reedy filed an ex parte motion to quash a subpoena for the deposition of the notary public who had notarized Helen's signature on the sixth amendment to her family trust. Reedy pointed out, among other things, that the time for taking new discovery in connection with the pending trial had long past. When asked to cancel the deposition, Letantia and Todd's counsel had asserted that the deposition was not being sought in connection with the pending trial (in which the sixth amendment was at issue) but in connection with another pending petition, *relating to the Elmer Trust*, which had not yet been set for trial.

At the ex parte hearing, the court denied immediate relief, but directed that the deposition date be reset pending a hearing on the motion to quash. It also, once again, warned Letantia and Todd's counsel: "[the ex parte request] has significance in it that should be heeded by you, and if there's any way that you can meet and confer prior to actually having the court rule on this, it might be in your best interest, and your client's best interest to do that." The court set a continued hearing for August 12, 2005. Letantia and Todd then filed an opposition, arguing that the deposition subpoena was valid and properly served, and that the notary's testimony would be relevant to issues also raised in two later petitions Todd had filed, which were not included in the current trial.

On August 11, one day before the hearing, Reedy filed an ex parte request that the court quash an additional *11* depositions scheduled by Todd and Letantia to take place prior to the recommencement of the pending trial on August 22, 2005, and to impose the previously requested issue and terminating sanctions. Ostensibly, each of these new depositions was also being sought in connection with the two other petitions not included in the pending trial, but Reedy characterized that contention as a "sham and deception," in light of the matters at issue in those remaining petitions.

The trial court's written tentative ruling made clear it found Letantia and Todd's contention that their sudden spate of new discovery was intended to relate to the *other* petitions (which were not yet even set for trial) to be incredible. As the court noted, the assertion that Letantia and Todd were suddenly trying to complete 12 depositions in connection with *those* petitions, prior to the August 22 resumption of trial in this case, was entirely inconsistent with counsel's prior representation that it would be practically impossible to even prepare this case in time, in light of the other pending matter in San Diego. Consequently, its tentative decision was to quash the subpoenas, and impose both monetary sanctions and terminating sanctions.

With respect to the imposition of the terminating sanctions, the court's tentative ruling explained that it had given Letantia and Todd the opportunity to proceed at trial, despite the "virtually unopposed" motions in limine spelling out the case for terminating sanctions. However, their performance in that trial, as well as their "inappropriate" attempted discovery, were both factors in its ultimate decision to terminate the case.

At the hearing, Reedy's counsel appeared and submitted on the tentative ruling. Neither Letantia nor Salzwedel was

present, however. Instead, another attorney informed the court she was making an appearance on Salzwedel's behalf, because he was engaged in another courtroom. She reminded the court of Salzwedel's position that the new discovery was "on two petitions that are separate from the five petitions that are currently in trial," and that "it's his position that he has the right to discovery on these two petitions." The court assured her that it understood Salzwedel's argument, and then announced that "the tentative ruling is hereby made the order of this court." The court vacated the pending trial, but retained the case on the court's calendar for what it characterized as a default prove-up. Based upon the evidence, the court entered judgments on each of the five petitions.

I

Letantia and Todd first contend the motions for terminating sanctions were "defective," for several different reasons. They assert the motions were made without the required period of notice; amounted to an improper use of the motion in limine procedure; and were disguised attempts to seek reconsideration of the court's denial of prior sanction motions, without compliance with Code of Civil Procedure section 1008.

The contention regarding proper notice fails for at least two reasons. First, the issue was clearly waived. Although Letantia's and Todd's oppositions to Reedy's motions in limine for terminating sanctions were—to put it mildly—cursory, they did file written opposition. And in doing so, they never so much as suggested notice was defective. [30]

[30] Letantia and Todd assert on appeal that their opposition to the motion in limine did include a argument that "due to the late filing of the motions, there was insufficient time to respond," and that this constituted an objection to the inadequate period of notice. But that is revisionist history. The document said no such thing. Instead, it accused Reedy's counsel of perjury, asserted that the motion was merely a rehash of prior

Letantia and Todd also appeared at the commencement of trial when the court considered the motions and took them under submission—again without asserting any defect in the notice.

As explained in *Tate v. Superior Court* (1975) 45 Cal. App. 3d 925, 930 [119 Cal. Rptr. 835], "[i]t is well settled that HN1 the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective." (See also *Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1375 [128 Cal. Rptr. 2d 200]; *Pacific Std. Life Ins. Co. v. Tower Industries, Inc.* (1992) 9 Cal.App.4th 1881, 1888 [12 Cal. Rptr. 2d 524] ["Tower has waived its right to complain of insufficient notice of the motion for judgment [because it] did not object to the motion on the ground of lack of notice."].)

Indeed, in *Carlton v. Quint* (2000) 77 Cal.App.4th 690 [91 Cal. Rptr. 2d 844], the court concluded that even when the opposing party does expressly object to the inadequate notice in its opposition papers, it may not be sufficient to preserve the issue for appeal. Instead, if the party appears at the appropriate hearing and opposes the motion on the merits—but without making any request for a continuance or demonstrating *prejudice* from the defective notice, the issue is waived: "[D]espite his claim of inadequate service and

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complaints, and stated that counsel had no further time to waste on such "garbage." We would be hard-pressed to construe that dismissive and insulting language as an objection to the notice, and certainly cannot fault the trial court for failing to do so.

notice in his opposition to the motion and at the summary judgment hearing, Carlton *did* file an opposition to the motion, appeared and argued at the hearing, never requested a continuance of the hearing and never claimed prejudice by reason of insufficient notice or service. *Under these circumstances, we conclude Carlton waived any claim of inadequate service or notice assuming, without deciding, that claim had any merit.*" (*Id.* at p. 697, italics added.)

And this brings us to the second major flaw in Letantia and Todd's inadequate notice argument. In order to obtain a reversal based upon such a procedural flaw, the appellant must demonstrate not only that the notice was defective, but that he or she was *prejudiced.* (*Israni v. Superior Court* (2001) 88 Cal.App.4th 621 [106 Cal. Rptr. 2d 48]; *Cordova v. Vons Grocery Co.* (1987) 196 Cal. App. 3d 1526 [242 Cal. Rptr. 605]; Code Civ. Proc., § 475.) As explained in *Lever v. Garoogian* (1974) 41 Cal. App. 3d 37, 40 [115 Cal. Rptr. 856], "Procedural defects which do not affect the substantial rights of the parties do not constitute reversible error. (Code Civ. Proc., § 475.)"

In this case, not only have Letantia and Todd failed to make any showing of prejudice, an objective review of the facts conclusively negates the idea. The record before us demonstrates Reedy gave Letantia and Todd repeated notices that she was seeking terminating sanctions, both before and during trial. Her final pretrial motion for terminating sanctions, made on regular notice, was ordered by the court to be heard in connection with the trial—and thus Letantia and Todd were expressly placed on notice that the issue would be taken up at that time.

Reedy's motions in limine—although served on Letantia and Todd prior to the court's decision that the terminating sanctions would be considered at trial—operated, in effect, as a reinforcement of the court's directive. There was simply no

basis for them to contend they did not realize the issue would be before the court at the commencement of trial.

As if that were not enough "notice," the court itself gave Letantia and Todd repeated warnings, during the course of trial, that it had taken Reedy's request for the sanctions under submission, and was considering imposing them. Months passed, without Letantia or Todd ever attempting to offer additional opposition on the merits of the sanction motions. And while Letantia and Todd now assert they would have been precluded from offering any such opposition, because the motions were "under submission," they rather inconsistently chastise the trial court for allowing Reedy to file additional documents related to the motions during the submission period.

We presume that if Letantia and Todd had ever sought to file additional opposition to the requested sanctions, the court would have considered it on the same basis as it considered Reedy's additional filings. Their failure to make any effort cannot be blamed on either the court or Reedy, and certainly cannot be attributed to any lack of "notice." Indeed, more notice of the requested terminating sanctions—and more opportunity to be heard in opposition—could hardly be imagined.

Letantia and Todd's next contention, that the motions amounted to an improper use of the in limine procedure, fares no better. They rely upon this court's opinion in *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327 [44 Cal. Rptr. 3d 426], and specifically on the concurring opinion of Justice Rylaarsdam—in which he decries the use of in limine motions as a substitute for summary judgment or summary adjudication motions, but without the procedural protections otherwise afforded in connection with the latter. That concern is inapplicable here, however, because the motions made by Reedy were not disguised motions for

summary judgment or adjudication, but were instead a renewal of her prior, properly noticed motion for terminating sanctions—a motion which the court had expressly directed *should be decided in connection with the trial*. There was simply no procedural shortcut attempted.

Moreover, to deny Reedy the opportunity to have her sanctions motion considered on the merits, merely because Letantia's and Todd's continuing disregard of their obligations required it to be heard late in the proceedings, and ultimately during the trial itself, would exalt form over substance, promote inefficiency, and ultimately reward Letantia and Todd for their continually unredeemable behavior.

Obviously, it would have been better if Letantia and Todd had complied with their discovery obligations promptly—or at least promptly *after the court ordered them to do to so*—but they did not. Despite Reedy's repeated efforts, and pleas to the court, Letantia and Todd kept delaying, and the court kept giving them the benefit of the doubt—right until the time for trial.

And it would have been nice if Letantia and Todd had fulfilled their obligations in connection with the pretrial issues conference, but they did not. And it would have been nice if they had heeded the court's repeated warnings once the trial was underway, but they did not do that either. Now the piper has demanded payment, and their continued disregard for their obligations as litigants simply cannot be spun into a reason for immunizing them from the consequences of that conduct.

We also reject Letantia and Todd's third contention, that the motions in limine were actually disguised motions for reconsideration of Reedy's prior sanction motions, without complying with the requirements of Code of Civil Procedure

section 1008. Although it is true that Reedy had previously requested terminating sanctions against Letantia and Todd—and those initial requests were denied—the final motion she brought shortly before trial, and then the in limine motions brought in connection with the trial itself, did not seek *reconsideration* of those prior denials. The later motions were based on Letantia's and Todd's additional conduct, which occurred *after* the court's earlier rulings. Although the court was being asked to consider this new misconduct against the backdrop of their prior actions, the motion was not merely a rehash of that past argument. Consequently it did not trigger the requirements of Code of Civil Procedure section 1008. (*Andrus v. Estrada* (1995) 39 Cal.App.4th 1030, 1042–1043 [46 Cal. Rptr. 2d 300] ["The court's ultimate grant of sanctions was based upon appellants' entire pattern of conduct over the course of the litigation. The court of the eastern division was entitled to consider appellants' earlier behavior, even though the court of the southern division had found the behavior exhibited up to that point did not merit sanctions."].)

II

Letantia and Todd next argue that terminating sanctions were unwarranted, because there was no substantial evidence they willfully violated any court orders, and the court failed to "expressly find that Appellants had violated [a] court order before imposing terminating sanctions." We must again disagree.

Initially, we note that willfulness is no longer a requirement for the imposition of discovery sanctions. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 260 [24 Cal. Rptr. 2d 501].) That requirement was dropped from Code of Civil Procedure former section 2023, subdivision (b), as part of the former Civil Discovery Act of 1986. (*Kohan v. Cohan* (1991) 229 Cal. App. 3d 967, 971 [280 Cal. Rptr. 474].)

But in any event, the record in this case is replete with evidence of what could only be construed as willful misconduct. In February of 2004, the court ordered Letantia to turn over all the records and documents which her late husband, John, had generated or maintained in the course of his tenure as trustee of the trusts at issue in this case. She did not. And when Reedy made a motion for sanctions based upon that failure, Letantia actually argued she had a fiduciary duty to keep the documents—despite the court's express directive—until the conclusion of the litigation. In September of 2004, the court ordered both Letantia and Todd to answer discovery without objections. They didn't. In fact, they offered no responses at all—on the specious basis that the court had imposed no specific deadline for their answers—until Reedy was forced to make an ex parte application to the court to impose one. Even then, the responses she finally got were saturated with objections. In September of 2004, Letantia was also ordered to appear for a second day of her deposition, which she never did. As these examples demonstrate, we are faced with abundant evidence of both willful misconduct and violations of court orders. Since there is no basis upon which anyone could conclude they were unaware of those orders and no other explanation suggest itself, we must construe their violations as willful.

As for the contention the court did not make any express findings in support of the sanction order, we will infer all necessary findings to support a judgment, so long as substantial evidence exists to support them. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928 [76 Cal. Rptr. 2d 866].) Moreover, as Reedy points out, the court did expressly state, in its decision denying Letantia and Todd's motion to vacate the defaults, that it considered their misconduct to have been willful.

III

Letantia and Todd next assert the court's decision to impose terminating sanctions was an abuse of discretion, and "violated the fundamental policy of resolving cases on their merits." Again, we disagree. Indeed, this case seems to illustrate the old adage that "no good deed goes unpunished." In our view, the court bent over so far backward in its effort to ensure this case would proceed on the merits—to give Letantia and Todd every benefit of the doubt, and every opportunity to ultimately comply with their obligations—that they began to believe their conduct was somehow acceptable. So they just kept pushing.

Their final effort; i.e., the attempt to schedule *11* depositions in the week prior to recommencement of the trial in this case, coupled with the flatly and literally incredible assertion the discovery was suddenly being sought in connection with *other petitions not yet scheduled for trial*, was understandably the last straw. [31] In the face of such an effort, the court could neither continue giving Letantia and Todd the benefit of the doubt, nor could it reasonably assume that some lesser sanction (such as additional monetary penalties) would be sufficient to curb their continued abuses.

"The court's discretion to impose discovery sanctions is broad, subject to reversal only for manifest abuse exceeding the bounds of reason." (*American Home Assurance Co. v. Société Commerciale Toutélectric* (2002) 104 Cal.App.4th 406, 435 [128 Cal. Rptr. 2d 430]; see *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 388 [97 Cal. Rptr. 2d 12]; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545 [51 Cal. Rptr. 2d 311].) The circumstances of this case do not demonstrate such an abuse. The record here

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[31] Keep in mind, these were parties who had insisted they could not be ready for the August trial date because they had to prepare for *another* lawsuit, a quiet title action whose trial date was approaching.

demonstrates the Bussells were recalcitrant in virtually every aspect of discovery, and failed to either produce documents or provide proper written answers to discovery. Letantia did not complete her deposition as ordered by the court, and Todd did not appear for trial, despite a notice requiring him to do so. Their obstinacy continued during trial.

Of course, Letantia and Todd contend on appeal that the court could have "better tailore[d] the sanctions to 'fit the crime,' " and we generally agree that such an effort should be made. (See, e.g., *Wilson v. Jefferson* (1985) 163 Cal.App.3d. 952 [210 Cal. Rptr. 464].) However, this was not a case, like *Wilson,* in which the discovery violation was limited to a single request for production of documents, which focused on one specific factual contention. In this case, Letantia's and Todd's obduracy was plenary. Moreover, they make no effort on appeal to suggest exactly how the court might properly have tailored its sanction order to more properly fit their "crime," nor why we should conclude that such a sanction would have been effective. We find no abuse of the court's discretion. Indeed, we marvel at its forebearance.

IV

Letantia and Todd also assert that the court erred in granting a quiet title judgment regarding the "ranch" property, despite the fact Todd had expressly withdrawn that claim from the case. They are wrong: The court issued no such judgment in this case. A quiet title action is a specific statutory proceeding in which the court takes "complete jurisdiction" over the property (Code Civ. Proc., § 760.040, subd. (b)), and pursuant to specified procedures renders a judgment which binds all persons, known or unknown, who claim any legal or equitable interest in the property. (Code Civ. Proc., § 764.030.) This was not such a proceeding.

Instead, what the court did in this case was merely determine, as between these parties, their relative percentages of ownership in the property. That determination was a necessary aspect of adjudicating Reedy's petition which sought a pro rata contribution from each of the parties for the losses associated with that property. There was no error in this regard.

V

Finally, Todd asserts the court exceeded its jurisdiction in entering default judgments against him—in the amount of $64,730 in case No. A217515; and in the amount of $294,516 in case No. A219334—because the petitions in neither case specified a particular amount of damages against him. To this we must—finally—assent.

Neither of Reedy's two petitions cited by Todd reflects even a ballpark estimate of the damages he is alleged to have caused, let alone a specific amount. Reedy's petition in case No. A217515 alleges that Todd improperly caused the sale of stock owned by Helen's initial trust, using an access number that had been issued to his late father, John. That sale allegedly resulted in "a long term capital gain of $227,620.27," and the petition consequently seeks "damages ... as determined by proof." Reedy's petition in case No. A219334 alleges that Todd, again using the access number belonging to John, caused the sale of stock which resulted in "a long term capital gain of $1,097,000." That petition seeks "damages incurred as a result of the sale of securities." Presumably, Reedy is seeking to hold Todd liable for the *adverse tax effect* of those capital gains, but in neither case is that effect quantified.

It is well settled that the court cannot enter a default judgment in an amount greater than demanded in a complaint. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826

[231 Cal. Rptr. 220, 726 P.2d 1295]; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App. 3d 381 [202 Cal. Rptr. 204].) That rule applies even if the default is entered as a result of discovery sanctions, rather than a failure to timely respond to the complaint. (*Greenup v. Rodman, supra*, 42 Cal.3d 822.)

However, as this court has previously concluded, the trial court may, in a case such as this where the complaint failed to specify the amount of damages sought, impose a more limited discovery sanction, which has the effect of precluding litigation of other aspects of the case, while leaving the parties to have a contested trial as to damages. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613 [34 Cal. Rptr. 2d 26].) In this case, Reedy consistently sought such evidentiary and issue sanctions, as an alternative to terminating sanctions, and we conclude that on remand, it would be appropriate for the court to reconsider whether such alternative sanctions against Todd would be appropriate in connection with petitions in case Nos. A217515 and A219334.

The judgment against Todd is reversed with respect to Reedy's petition in case Nos. A217515 and A219334, and those petitions are remanded with directions that the court reconsider whether more limited issue sanctions, relating to liability only, would be appropriate, and for further proceedings in accordance with that decision. The judgment is affirmed in all other respects. Reedy is to recover her costs on appeal.

Sills, P. J., and Fybel, J., concurred.

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3
FILED

MAR 26 2007

Deputy Clerk _____

JACQUELINE B. REEDY, as Trustee, etc. Plaintiff and Respondent, v. LEVANTIA BUSSELL et al, Defendants and Appellants.	G036327 (Consol. with G036328, G036329, G036330, G036331) (Super, Ct. Nos. A217515, consol. with A218588 & A219334 ORDER DENYING PETITION FOR REHEARING

The Petition for rehearing, which combines arguments not timely raised with reargument of positions which failed to convince the court in the first instance, is DENIED.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.

cc: See attached list

Court of Appeal, Fourth Appellate District, Div. 3 – Nos. G036327/G036328/G036329/G036330/G036331

S152657

THE SUPREME COURT OF CALIFORNIA

En Banc

JACQUELINE B. REEDY, as Trustee, etc.,
Plaintiff and Respondent,

v.

LETANTIA BUSSELL et al.,
Defendants and Appellants.

The petition for review is denied.

SUPREME COURT
FILED

JUN 13 2007

Frederick K. Chirich Clerk

DEPUTY

GEORGE

Chief Justice